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IN THE

Supreme Court of the United States

October Term, 1949.

No. 296

SAM ORMONT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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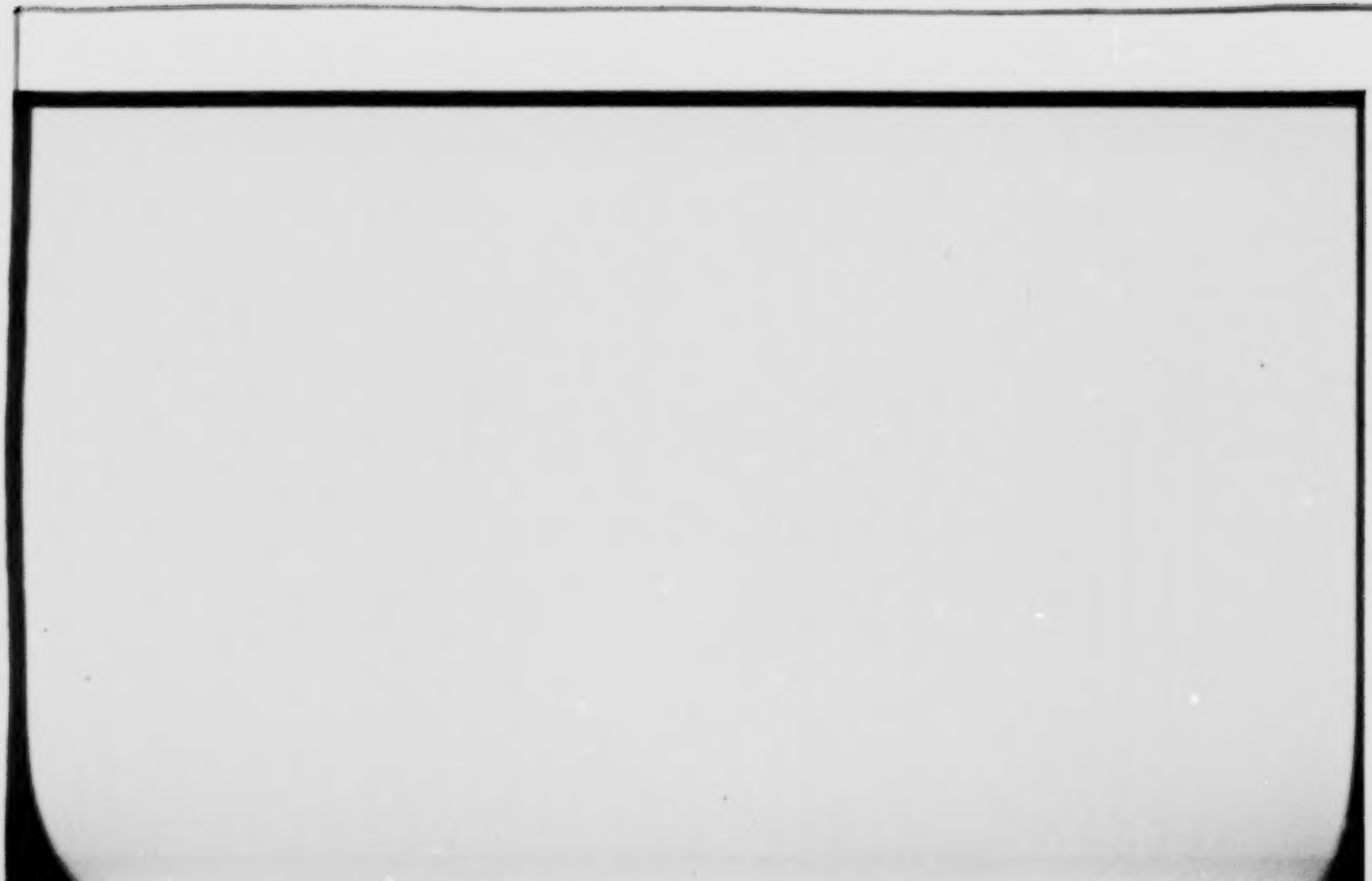

IN THE

Supreme Court of the United States

October Term, 1949.

No.....

SAM ORMONT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Supreme Court of the United States:

Comes now Sam Ormont, hereinafter styled petitioner, and, applying for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, respectfully shows:

A.
OPINION BELOW.

The opinion of the Court of Appeals appears in the record [R. Vol. V, pp. 1646-1707]. The judgment and sentence of the District Court also appears in the record [R. Vol. I, pp. 139-140].

B.
JURISDICTION.

Judgment of the Court of Appeals sought to be reviewed was entered on June 3, 1949, and petitioner's petition for a rehearing before said Court was timely filed and was denied on August 1, 1949 [R. Vol. V, p. 1710]. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254, Subdivision 1.

C.
QUESTIONS PRESENTED.

1.

Was the petitioner's constitutional rights against being twice placed in jeopardy violated?

2.

Where a jury was duly impaneled, accepted, and sworn, and defendant thereby placed in jeopardy, did the Court have the right thereafter, and without defendant's consent, to discharge that jury merely because, while the jury was being impaneled, and before it was so passed, accepted, and sworn, the U. S. attorney had merely made reference to an O. P. A. case, but no challenge to the panel or to any of the jurors was interposed by any of the parties on the ground of such reference, but all the parties with full knowledge of said statement accepted the jury, thereby conclusively waiving all grounds of challenge?

3.

Under such circumstances above delineated, has the Court the right to again place the defendant in jeopardy before another jury where proper objection to so doing has been previously made without violating the Fifth Amendment to the Constitution of the United States?

4.

Was the petitioner's constitutional right against being compelled to be a witness or furnish evidence against himself violated?

5.

Where petitioner was subpoenaed and pursuant thereto was interrogated by the Grand Jury respecting profits and illegal payments he had made for slaughtering livestock for the year 1944 was he thereby immune from prosecution respecting his income and income tax?

6.

Where certified public accountant is employed by the attorney for a defendant to help such attorney and as his agent, in preparing income tax returns and documents and giving advice pertaining thereto for the client, are communications by the client to such attorney and accountant privileged?

7.

Was the defendant's constitutional right against being compelled to be a witness against himself, violated where the Court intimated to the U. S. attorney, before the jury, that he might resort to the processes of the Court to compel the defendant to produce his books and pursuant thereto, the U. S. attorney caused the Marshal to serve a *subpoena duces tecum* on the defendant in open Court, in plain view and presence of the jury, *and where no admonition to the jury to disregard such error and conduct was given?*

8.

Was it error for the Court to refuse to grant a motion to strike the testimony of witnesses pertaining only to counts of the indictment on which the Court had previously acquitted the defendant?

9.

Did the acquittal by the Court of the defendant for Counts 3 and 4 for prior years, 1942 and 1943, constitute *res judicata* so as to prevent the prosecution from using said evidence for the purpose of determining wilfulness in the year 1944?

10.

Did the argument of the U. S. attorney constitute prejudicial misconduct?

11.

Was the Court of Appeals justified in holding that the activities of the U. S. attorney were merely subject to criticism and not prejudicial misconduct?

12.

Where conflicting, confusing, and erroneous instructions were given to the jury, can the Court say that no prejudice was suffered, and that the jury followed one instruction and not the other in arriving at a verdict?

a. Where indictment specifically alleged the *manner and means* employed by defendant to commit the alleged attempt to evade which consisted of only two, namely: (1) filing an alleged false income and victory tax return, and (2) by concealing from the Collector and officers of the United States the correct gross and net income, was it not prejudicial error for the Court to instruct the jury

in effect that if they found defendant had attempted "in any manner" to evade his tax they could find him guilty?

b. Was it not error for the Court to instruct the jury that a taxpayer is required to report all sums "earned" for the calendar year in which the same were "earned" when such taxpayer was on a cash basis?

c. Was it not prejudicial error for the Court to instruct the jury in effect that they were to determine whether or not a substantial part of $71,000.00 was in fact received by each of the defendants as part of his income from the Acme Meat Company operations, without further instructing the jury that even if they so found that, it would be further necessary for the jury to find that such money was so received in the calendar year 1944, and was it not error in the same instruction to tell the jury that they must determine whether or not "books *and* records" were kept as required by the statute.

d. Was it not error to quote Section 41 of the Internal Revenue Code which said in part:

> "But if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, *the computation shall be made in accordance with such methods as in the opinion of the commissioner clearly reflect his income.*" (Italics supplied.)

without any evidence in the record showing that the commissioner had determined any method or if so what such method was, and which section further stated:

> "If the taxpayers annual accounting period is other than a fiscal year *as defined in Section 48* * * *"

without also instructing the jury as to the contents of said Section 48.

e. Did not the Court, by said instruction, submit to the jury the decisions of questions of law or matters to be determined by the Commissioner of Internal Revenue?

13.

Did not the Court err in failing to instruct the jury on his own motion that they might find the defendant under the indictment guilty of a misdemeanor under Subdivision A of Section 3616 of Title 26, U. S. C., and also Section 145 A of the same book.

D.
SUMMARY STATEMENT OF MATTER INVOLVED.

1.
Indictment and Plea.

Petitioner was charged by indictment of the Grand Jury in this case, jointly with one Phillip Himmelfarb in Counts 1 and 2, and singly in Counts 3 and 4. The first count charged petitioner and Phillip Himmelfarb with attempting to defeat and evade a large part of the income tax due and owing by Sam Ormont to the United States of America for the calendar year 1944

> "by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income and *victory tax return* * * *" (Italics supplied.) [R. Vol. I, pp. 2-3.]

Count 2 charged the defendants jointly with an attempt to defeat and evade a large part of the income due and owing from Phillip Himmelfarb for the calendar year 1944.

Count 3 charged the petitioner, Sam Ormont, with attempting to evade and defeat part of his income tax for the calendar year 1943. Count 4, a similar charge against petitioner, Sam Ormont, for income tax for the calendar year 1942 [R. Vol. I, pp. 2-6]. To all of which Counts petitioner entered a plea of not guilty.

2.
Double Jeopardy.

A jury was duly impaneled and sworn to try the defendants on May 22, 1947 [R. Vol. I, p. 242]. Thereupon, William Katz, Esq., attorney for Phillip Himmelfarb only, in behalf of his client, made a motion to declare a mistrial and discharge the jury for the reason that the prosecuting attorney, William Strong, during the selection of the jury (before it was accepted and sworn) "made a reference to a pending O. P. A. case" [R. Vol. I, p. 257], which motion with consent of the Government Counsel was granted by the trial judge, and said jury was *discharged without the consent of petitioner, Sam Ormont* [R. Vol. I, p. 260]. Thereupon, petitioner, Sam Ormont, through his attorney, Daly B. Robnett, Esq., made a motion to dismiss the case, and to enter a plea of once in jeopardy on the ground that said jury after being duly impaneled and sworn had been so discharged without the consent of the petitioner [R. Vol. I, pp. 302-303], which motion was denied by the Court in the following language:

> "The Court: I was under the impression that the motion was made on behalf of both defendants. Even so, in considering the matter on the merits, I do not think the motion for a once in jeopardy plea is well taken. While the jury was sworn, there was not even a witness sworn, no opening statement to the jury,

and there was nothing that the jury could decide it on. There was no evidence, no presentation of any kind, and I think there has to be more than the mere swearing of a jury to place a defendant once in jeopardy. The motion will be denied." [R. Vol. I, p. 304.]

Thereupon, a second jury was impaneled by the same Court and trial judge, and the defendants were jointly tried before such jury.

3.

Immunity From Prosecution.

The petitioner was subpoenaed before the Grand Jury of the Southern District, Central Division of California, and was questioned and testified concerning his income for 1944 as follows:

"Q. During your entire operations there, from the time you went in to the time you went out, you never knew whether you were solvent or insolvent? A. I never did go out of business.

A Grand Juror: Did you make money while at the Southern California Meat Company?

The Witness: Yes, we showed a nice profit." [R. Vol. I, p. 233.]

On page 235 of the same record we quote:

"A Grand Juror: How many times did you lose?

The Witness: I don't think I had an instance of once where I lost.

A Grand Juror: In other words, you came out with a profit?

The Witness: In my particular instance, I did the livestock purchasing myself; I had no outside buyers."

and during the same examination he was asked in great detail as to over-payments he had made for slaughtering cattle—payments which were in violation of the O. P. A. [see R. Vol. I, pp. 214-236], and not properly deductible from income.

4.

Privileged Communications.

During the trial the government produced a Certified Public Accountant by the name of William S. Malin as a witness, which accountant testified that he was employed by a Mr. Mirman who at the time was attorney for petitioner, Sam Ormont and defendant, Phillip Himmelfarb, to help said attorney in connection with the income taxes of petitioner, Ormont, and defendant, Phillip Himmelfarb [R. Vol. III, pp. 1094 and 1101]. The witness was allowed, over objection, that all communications to the witness by either defendant were privileged to testify that he sent Exhibits 51 A, B, C, and D to Mr. Bircher (who was an agent of the Internal Revenue Department) [R. Vol. III, pp. 1108-1115, 1123], and over a like objection, and further objection, there was no foundation laid (there was no evidence of Malin's authority from Ormont or his attorney to deliver said exhibits to Mr. Bircher), said exhibits were admitted in evidence [R. Vol. III, pp. 1114 to 1119], and over a similar objection the witness was allowed to testify that he got the information contained in these exhibits, particularly Exhibit 51 A from the taxpayer's records [R. Vol. III, pp. 1119-1120].

5.

Violation of Fifth Amendment of Constitution.

During the course of the trial in the presence of the jury, the Court intimated to the prosecution that it might use the processes of the United States Government and of that Court to compel the production of defendant's books and records [R. Vol. II, pp. 599-600]. Thereafter, the prosecution caused a *subpoena duces tecum* to be issued by the Clerk of said Court directed to petitioner, commanding him to produce his books, and caused a Deputy United States Marshal to serve said subpoena on said defendant in open court and in plain view of the jury, and without instructing the jury to disregard the activity of the prosecutor the Court and Marshall which was thereafter assigned as prejudicial error [R. Vol. III, p. 889].

6.

Res Judicata, Evidence Pertaining to Counts 3 and 4 Submitted to Jury.

The trial consumed approximately four weeks, during which time two witnesses, Eustice and Link, were the chief witnesses for the prosecution, and the former was the government's expert, and he testified for days on Counts 3 and 4, being for the years 1942 and 1943. At the close of the prosecutions case, defendant Ormont's counsel moved the Court for a dismissal and acquittal of said defendant on each separate count of the indictment, and the Court granted such motion, and acquitted the defendant (petitioner) on Counts 2, 3, and 4. Immediately thereafter, the counsel for petitioner made motions to strike the testimony and evidence of witnesses, Eustice and Link, pertaining to the years 1942 and 1943, on the ground that

defendant had been acquitted for those two years, and it would be prejudicial error to leave such evidence before the jury. Said motions were denied [R. Vol. IV, p. 1374]. The prosecuting attorney used this evidence to obtain a verdict on Count 1.

7.

Prejudicial Misconduct of Government Attorney.

The prosecuting attorney was guilty of prejudicial misconduct and attempted to, and did excite the prejudices of the jury, and its resentment to defendant and defendant's case in his argument to the jury by falsely accusing defendant's counsel of "dragging" in extraneous matters which had nothing to do with the case and of wasting the time of the Court and jury in nothing but attempts to confuse [R. Vol. IV, pp. 1459-61], from which we quote as follows:

> "I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. *Very confusing, no doubt about it,* and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get the final picture. You will have so many pieces that have nothing to do with it that you may give up. [R. Vol. IV, p. 1459.]
>
> * * * * * * * *
>
> Yes, there is an attempt to confuse, there is an attempt to drag something else in, * * *" [R. Vol. IV, p. 1460.] (Italics supplied.)

And further he said:

> "I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts *shown on the books and records*

of the Acme Meat Company and the amounts shown upon the bank records that are undenied and undisputed as of this amount, *and that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.*

Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—*this thing went on for so long that after a while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on.* And that is another thing to consider, as I told you, because this case deals with concealment of money, failure to report money and an attempt to defeat and evade a tax." [R. Vol. IV, p. 1461.] (Italics supplied.)

And thereafter he said:

"And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—just forget all about these things that were dragged in and that have nothing to do with this case, and what does this case consist of?" [R. Vol. IV, p. 1481.]

The evidence and cross-examination above referred to by the prosecuting attorney was very pertinent and demonstrated to the trial court that defendant was innocent of the charge of Counts 2, 3, and 4, and that the government's expert was merely building up an arbitrary case based on hypothesis as was stated by the Court:

"But, on Counts 2 and 3, the whole case is built upon by an arbitrary accounting method used by the Government agent." [R. Vol. IV, p. 1370.]

And again on page 1372 the Court said:

"I think it is not good law, on a criminal charge against a person, to let an agent, however credible he is, or sincere he might be, upon a hypothesis to build up a crime." [R. Vol. IV, p. 1372.]

And again he falsely stated to the jury that the books were in evidence as follows:

"The books speak for themselves. *That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case.*" [R. Vol. IV, p. 1559.] (Italics supplied.)

The books were not in evidence.

Once more he falsely stated as follows:

"But I ask you, what are those payments? Do you think they were payments in the business, which Mr. Ormont earned, as he reported, some $12,000, in the year 1944; he had such a fine clientele that they gave him gifts, approximately eight-twelfths of the sum he reported in 1945; about $220,000.00. Do you believe he got $220,000.00 in free and voluntary gifts?" [R. Vol. IV, p. 1470.]

There is absolutely no evidence to this effect anywhere in the record.

Again the U. S. Attorney misstated the facts as follows:

"And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in *1943* (italics supplied) (defendant Ormont was acquitted by the Court prior to the argument for the year 1943) out of the $12,000 he bought about $8000 worth of bonds. You remember that testimony, $8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference

[R. Vol. IV, p. 1476] from that, that the unreported income which Mr. Eustice claims this man accumulated during that year because he bought $8000 worth of bonds.

Take the $8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find over $50,000 worth of bonds bought that year—$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the Schedule and it is in evidence.

What is $8000 off of that? It is $42,000. Well, let's assume he had $8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. *Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know.*" [R. Vol. IV, pp. 1476, 1477.] (Italics supplied.)

The foregoing statement was absolutely false and known by the prosecuting attorney to be false as he had already established by the government's expert, Mr. Eustice, from whom he was entirely relying as to those bonds for the year 1943 the following:

"A. He purchased United States Government bonds during 1943 of $51,475.

The Court: How much?

The Witness: $51,475.

Of these bonds he purchased by checks drawn on his personal bank accounts $32,390.24, and by checks drawn on his business bank account, that is, Acme Meat Company, $5000.

It was the total of those two items, that is, from known sources, $37,390.24. The difference between that and the actual bonds purchased was $14,084.76, which could not be traced to any known sources and was not explained by the taxpayer where the source of the funds came from." [R. Vol. II, pp. 539, 540.]

The checks referred to by counsel and the $8000 fully covered the $14,000 bond item above.

The prosecuting attorney falsely accused petitioner of falsifying records, although the Court had previously admonished him that such was not the fact. Yet he said to the jury as follows:

"Mr. Link testified. * * * But the important thing is that he testified to, and the important thing that counts in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, *is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.*" [R. Vol. IV, pp. 1461, 1462.] (Italics supplied.)

The testimony of Link regarding these changes on the books was that Mr. Ormont had given personal checks for additional amounts on purchase price of cattle and wanted them entered and at the time the evidence was introduced the following remark was made by Mr. Strong and the following admonition was made by the Court:

"Mr. Strong: It proves that the records are false.

The Court: Government counsel's statement to the jury will be disregarded by the jury." [R. Vol. II, p. 504.]

and on cross-examination with regard to the entering on the books of these additional items the witness testified that Mr. Ormont had paid the same. We quote as follows:

"The Court: He actually paid the additional money?

The Witness: He paid the additional money with a check which was drawn.

The Court: He paid the additional $3000?

The Witness: Yes.

The Court: *So that the books were accurate when it said that he spent $3000 more?"* [R. Vol. II, p. 492.] (Italics supplied.)

The government counsel also was guilty of misconduct in the following particulars in that he repeatedly argued to the jury that the cross-examination of the witness, Eustice, was based entirely upon hypothetical questions; that there was nothing in the record to show that the facts based therein were true, but that all such things were purely supposition or assumptions and further stating that the witness, Eustice, did not use a single one of the checks in evidence in determining the unreported income which the government claimed in the indictment [R. Vol. IV, pp. 1457-1458], and further misled the jury in referring to all the checks and all the evidence in the cross-examination was brought in merely to confuse the jury and had absolutely nothing to do with the case. To demonstrate the falsity of the argument, witness, Eustice, identified a check of $186.00, and said he did take it into account as unexplained income [R. Vol. II, p. 678], and he also identified a great list of checks that he took into account as unexplained income [R. Vol. II, pp. 690-691], and an-

other check that was taken into unreported income [R. Vol. II, p. 693]. Testifying concerning Exhibits S and T, S being a check for $1,332.27 to reimburse Mr. Ormont for the checks embraced in Exhibit T, the witness said that he did not give credit for said sum as applying on the purchase of bonds, but instead charged that amount, and more as unreported income [R. Vol. II, pp. 779-780]. Eustice admitted that if Exhibit S was used to purchase bonds, that would change his calculations as to the amount of unexplained income [R. Vol. II, p. 785]. Although the District Attorney said there was no proof as to any of these items, the defendant testified positively that this $1,332.27 was used by him to purchase bonds [R. Vol. IV, p. 1303]. As to Exhibit Y, Eustice admitted that he did take it into account in determining the unreported income [R. Vol. II, pp. 822-823]. Yet the District Attorney told the jury that Eustice didn't take any of these checks—not a single one of them—into account and that there was no evidence that any of them were used to purchase bonds. Yet the undisputed testimony of appellant that these checks in Exhibit Y were used to purchase bonds [R. Vol. IV, p. 1300]. As to Exhibit Z, Eustice admitted that he gave no credit for that check on the purchase of bonds, but charged the entire amount of the bonds to unexplained income and did use it in the calculation [R. Vol. II, pp. 793-794]. Mr. Ormont testified positively that this check was used to buy bonds [R. Vol. IV, pp. 1300-1321]. U. S. Counsel told the jury that all the government had to prove was a substantial amount of money as unreported income.

> "If we prove a substantial amount of money, it is just as good as proving the whole figure." [R. Vol. IV, p. 1480.]

8.

Erroneous, Confusing and Conflicting Instructions.

The Court erred in the following charge to the jury:

> "In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as *claimed* by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944." [R. Vol. IV, p. 1578.] (Italics ours.)

Government counsel argued to the jury that all that was necessary for the government to prove was a substantial amount of money.

> "It is just as good as proving the whole figure." [R. Vol. IV, p. 1480.]

He also argued that $11,000 was enough [R. Vol. IV, pp. 1551-1552]. The indictment charged $24,000 which is the amount which must be proved. The United States Court of Appeals admitted [R. Vol. V, p. 1684] that the instruction was erroneous, and should have used the word *"alleged"* rather than *"claimed."* The Court also erroneously charged "books *and* records" are required to be kept under the Internal Revenue regulations, whereas the regulation says "books *or* records," and then went on and erroneously said:

> *"If 'no books or records' of the type required by law are kept,* a fiscal year return cannot be filed, but the sums *'earned'* must be reported upon the calendar year return for the year in which they were *'earned'."* [R. Vol. IV, p. 1583.] (Italics supplied.)

Defendant assumed that government's counsel had correctly quoted the regulation, hence no exception was taken.

The Court also instructed:

"A taxpayer who is on a cash basis need not report any income on his return that may be due him *until he actually receives the said cash income.*" (Italics supplied.) [R. Vol. IV, p. 1584.]

The Court erred in giving the following instruction:

"The law under which these defendants were indicted in substance provides as is applicable to this case, that any person who wilfully attempts *in any manner* to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:

> "'Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for any and pay over such tax, and any person who wilfully attempts *in any manner* to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,' shall be punished in the manner provided by law." [R. Vol. IV, pp. 1574-1575.] (Italics supplied.)

The Court erred in giving the following instruction:

"There has been placed in evidence the income tax return for the fiscal year May 1944 to April 1945, which was filed by the defendant on May 24, 1945, In this connection, it is part of your functions to decide whether the defendants actually had some income-producing enterprise, or enterprises, *from which they derived the sum of roughly $71,000,* which they reported on the fiscal year basis in that return. In this connection, you must determine what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company, if you de-

cide they were engaged together in the Acme Meat Company, and whether the money was received as income with reference to some other transaction not part of the Acme Meat Company sales and operations.

"Ultimately you are to decide in this connection, among other things, whether the $71,000 odd dollars reported on the fiscal year return was or was not part of the income derived from the sales made as part of the operations of the Acme Meat Company, and *whether that money,* or a substantial part of that money, *was in fact received by each of of the defendants as part of his income* from the Acme Meat Company operations; and if not, then whether or not books *and* records were kept of such other enterprise as required by the statute.

"The statute in that connection, Section 41 of the Internal Revenue Code, reads as follows:

> " 'The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, *the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income.* If the taxpayer's annual accounting period is other than a fiscal year as defined in *section 48* or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.' " [R. Vol. IV, pp. 1581-1583.] (Italics supplied.)

Objections were duly made and exceptions taken to each of the foregoing instructions.

E.
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Court of Appeals has decided important questions of federal law which has not been, but which should be settled by this Court as follows:

a. The Court of Appeals decided that where, during the impanelment of a jury the government attorney made some reference to an O. P. A. case, but no party challenged the jury or any member thereof on that ground, but conclusively waived all objections and challenges to the jury, and allowed it to be duly sworn to try the defendants, and after it was so sworn, the Court, without the consent of the defendant (petitioner) discharged the jury on motion of a co-defendant, which motion was based entirely upon the said reference by the United States attorney, that such discharge of said jury and the impanelment of another jury over the objection of the petitioner did not constitute placing the petitioner twice in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States;

b. The Court of Appeals incorrectly decided that the circumstances above set forth constituted "manifest necessity" or "legal necessity" for the discharge of the said jury;

c. The Court incorrectly decided that the circumstances above set forth constituted "urgent circumstances or an emergency which by diligence and care could not have been averted and which would thwart the administration of justice," and that the Court was vested with discretion

to discharge the jury without petitioner's consent, without abridgment of the constitutional guarantee.

The opinion of the United States Court of Appeals, Ninth Circuit, lays down a rule of law with respect to determination of double jeopardy that puts it entirely in the hands of the trial judge as to whether or not a defendant has been once in jeopardy to the end that the yard stick laid down in the well known case of *United States v. Perez,* 9 Wheat. (22 U. S.) 579, 6 L. Ed. 165, and followed for more than 60 years, is meaningless and a defendant is placed at the whim of the trial court in never knowing whether he will be arbitrarily deprived of the jury sworn and accepted by the parties to a criminal action, and in which he thereby has a vested right, and the right of a defendant under the Fifth Amendment to immunity against being twice placed in jeopardy is nullified. (*Hartzell v. U. S.,* 72 F. 2d 569, cert. den., 293 U. S. 621, 55 S. Ct. 216-217; *Craig v. U. S.,* 81 F. 2d 816 (C. C. A. Cal.), 83 F. 2d 850; 50 Corpus Juris Secundum, 927, note 5, and authorities cited.) Under the guise of "urgent necessity" the opinion of the United States Court of Appeals has held that even a ground of challenge to a juror known by a defendant before the jury is sworn, but never asserted, and, therefore, conclusively waived may thereafter be used as an "urgent necessity" for discharging the whole jury, even though no showing of prejudice by reason of such cause of challenge is shown. These matters of fundamental constitutional law deserve pronouncement by this Court.

2.

That the Court of Appeals has decided questions involving the constitutional rights, privileges and immunities of petitioner under the Constitution of the United States in a way probably in conflict with applicable decisions of this Court; it has, by its opinion, announced rules of law which tend to abrogate and nullify the rights, privileges and immunities of this petitioner under the Fifth Amendment to the Constitution. It has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. (*U. S. v. Perez,* 9 Wheat. 579, 6 L. Ed. 165; *Wade v. Hunter,* 336 U. S. 684; *U. S. v. Oppenheimer,* 242 U. S. 85, 61 L. Ed. 161, 37 Sup. Ct. Rep. 68; *U. S. v. Monia,* 317 U. S. 424, 87 L. Ed. 376; *Lonergan v. U. S.,* 88 F. 2d 591, cert. granted, 58 S. Ct. 18, 302 U. S. 663, 82 L. Ed. 512, reversed 58 S. Ct. 430, 303 U. S. 33; *Johnston v. Zerbst,* 304 U. S. 458; *Glasser v. U. S.,* 315 U. S. 60; *Von Moltke v. Gillies,* 332 U. S. 708; *Mills v. U. S.,* 164 U. S. 644, 17 S. Ct. 210, 41 L. Ed. 584; *Spies v. U. S.,* 317 U. S. 492.)

3.

The decision and opinion of the Court of Appeals in this case has decided important questions of federal constitutional law in a manner in conflict with decisions of other Courts of Appeals on the same matter, which constitutional questions have not been, but because of their

extreme importance to all citizens, taxpayers, attorneys and accountants of these United States, and to the government should be settled by decision of this Court. The decision is in conflict with *LaLance & Grosjean Mfg. Co. v. Haberman Mfg. Co.* (C. C. N. Y.), 87 Fed. 563; *McKnight v. U. S.* (6th), 115 Fed. 972, 54 C. C. A. 358; *In re Food Conservation Act,* 254 Fed. 893; *Nicola v. U. S.* (3d), 72 F. 2d 780; *Fina v. U. S.,* C. C. A. Colo., 46 F. 2d 643; *U. S. v. Andolschek* (2d), 142 F. 2d 503; *McCrea v. Jackson* (6th), 148 F. 2d 193; *Kinard v. United States,* 68 App. D. C. 250, 96 F. 2d 522, 523; *Kreiner v. U. S.* (2d Cir.), 11 F. 2d 722, 731.)

If the opinion of the Court of Appeals is allowed to stand:

a. All clients must communicate with their attorney, at their peril, where an agent of the attorney is present;

b. A new precedent will be established depriving the client of his constitutional and common law right to have privileged communications between himself and his attorney, merely because the attorney needed and employed and expert (C. P. A.) to assist him in giving advice and performing services for the client;

c. It will mean that every C. P. A. performing tax services for a citizen where employed by an attorney, immediately becomes an involuntary "stool pigeon" for the government.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, the full proceedings in this case, Numbered 11666, *Sam Ormont, Appellant, v. United States of America, Appellee,* and that said judgment of the United States Court of Appeals, Ninth Circuit, may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper, and your petitioner will ever pray.

WILLIAM JENNINGS BRYAN, JR.,

SAM ORMONT,

Petitioner,

By DALY B. ROBNETT and
BENJAMIN KOSDON,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1949.

No. .....

SAM ORMONT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported.

II.

Jurisdiction.

1. The writ of certiorari is applied for under Rule 38 of this court and jurisdiction is invoked under 28 U. S. C., Section 1254, Subdivision 1, and is the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583.

2. The opinion and judgment of the Court of Appeals for the Ninth Circuit was filed on June 3, 1949 [R. Vol. V, pp. 1707-1708]. Petition for rehearing was timely filed and denied on August 1, 1949 [R. Vol. V, p. 1710].

III.

Statement of the Case.

A full statement of the case has been given under "A" in the petition for writ of certiorari, *supra,* and in the interest of brevity, is not here repeated.

IV.

Specification of Errors.

The Court of Appeals Erred:

(a)

First. In holding that the petitioner's constitutional rights against twice being placed in jeopardy were not violated.

Second. In holding that the trial court had the right to discharge the first jury without the defendant's consent after the jury was duly impaneled, accepted and sworn, merely because while the jury was being impaneled and before it was so passed, accepted and sworn, the U. S. attorney had merely made reference to an O. P. A. case, but no challenge to the panel or to any of the jurors was interposed by any of the parties, including the judge, on the ground of such reference, but all the parties with full knowledge of said statement accepted the jury, thereby conclusively waiving all grounds of challenge.

Third. In holding that the trial court under the circumstances above delineated had the right to again place the defendant in jeopardy before another jury, where proper objection to so doing had been previously made, without violating the Fifth Amendment to the Constitution of the United States.

(b)

First. In holding that the petitioner's constitutional right against being compelled to be a witness or furnish evidence against himself was not violated.

Second. In holding that where petitioner was subpoenaed and pursuant thereto was interrogated by the Grand Jury respecting his profits for the year 1944 and illegal payments made for slaughtering livestock he was not immune from prosecution respecting his income and income tax under any immunity statutes, even though the government got its "pound of flesh" or its *quid pro quod*.

Third. In holding that communications to a C. P. A. who was employed by and as the agent of the attorney for the defendant to assist said attorney in preparing defendant's income tax reports, were not privileged.

Fourth. In holding that the defendant's constitutional right against being compelled to be a witness against himself was not violated where the trial court intimated to the U. S. attorney in the presence of the jury that the U. S. attorney might resort to the processes of the Court to compel the defendant to produce his books and pursuant thereto the U. S. attorney caused the Marshal to serve a *subpoena duces tecum* on the defendant in open court in plain view and presence of the jury and where no admonition to the jury to disregard such error and conduct was given.

(c)

First. In holding that the trial court properly refused to grant a motion to strike the testimony of witnesses pertaining to counts of the indictment on which the court had previously acquitted the defendant.

Second. In holding that the acquittal by the court of the defendant for Counts 3 and 4 for prior years, 1942 and 1943 did not constitute *res judicata* so as to prevent the prosecution from using said evidence for determining wilfulness in the year 1944.

(d)

First. In holding that the activities of the U. S. attorney were merely subject to criticism and not prejudicial misconduct.

(e)

First. In holding that although instructions were conflicting, confusing, and erroneous that no prejudice was suffered.

Second. In holding that the giving of an erroneous instruction was cured by giving a conflicting correct instruction.

Third. In holding that the trial court did not err in failing to instruct the jury on his own motion that they might find the defendant under the indictment guilty of a misdemeanor under subdivision A of Section 3616 of Title 26, U. S. C., and also Section 145 A of the same book.

Fourth. In holding that the trial court did not err in giving to the jury an instruction which referred to a statute merely by number and not instructing the jury as to the substance of such statute.

Fifth. In holding that the trial court did not err in instructing the jury that they might find the defendant guilty if they found that he had attempted to evade his income tax "in any manner" and not confining said instruction to the manner alleged in the indictment.

V.
ARGUMENT.

1.
Double Jeopardy.

The petitioner was placed in double jeopardy in violation of his constitutional rights when the trial court, *without the consent of the petitioner,* and after all objections to the panel and to the individual jurors had been *conclusively waived* by all parties and the jury accepted and sworn, thereafter made an order dismissing and discharging such jury merely because, *during the course of impanelment of the jury* the prosecuting attorney had made reference to an O. P. A. case.

The Court of Appeals in its own decision correctly held that neither petitioner, nor his counsel, consented to the discharge of the jury and had not waived the constitutional rights of the defendant to plead prior jeopardy.

See:

7 Corpus Juris Secundum 897, 922, Note 50;

Glover v. Bradley, 233 Fed. 721;

United States v. Newman, 25 F. 2d 357 (reversed on other grounds, 28 F. 2d 1684);

Bonnifield v. Thorp, 71 Fed. 924 (appeal dismissed, 83 Fed. 1002);

U. S. v. Watson, 28 Fed. Cas. No. 16651;

Price v. McComish, 22 Cal. App. 2d 92 at 97-99 (even though the stipulation was in open court in the presence of his client);

Davidson v. Gifford, 100 N. C. 18, 6 S. E. 718;

Holt v. State, 160 Tenn. 366, 24 S. W. 2d 886;

Jacobs v. State, 85 Tex. Crim. 505, 213 S. W. 628;

Redsted v. Weiss, 71 Cal. App. 2d 63;

State v. Crain, 22 Mo. 54, 100 S. W. 422;

Vol. 1, Thornton on Attorneys-at-Law, page 386.

Even consent of accused's counsel to the discharge of the jury after it has been impaneled and sworn is not binding on the accused and does not prevent his reliance on the plea of further jeopardy.

Cliett v. State, 167 Ga. 835, 147 S. E. 35 (39 Ga. App. 510, 147 S. E. 724);

Hipple v. State, Tex. Crim. 191 S. W. 1150, I. R. A. 1917(d) 1141, 22 C. J. S. 400 (Note 67).

As was said on page 386 of Volume I, Thornton on Attorneys-at-law:

> "An attorney certainly cannot bind his client by unauthorized acts which amount to a surrender in whole or in part of any substantial right."

To the same effect, see:

2 Ruling Case Law, p. 995;

3 Cal. Jur. 667 and authorities there cited.

Silence of the accused or his attorney does not constitute consent to the discharge of a jury or a waiver of constitutional inhibition against a second jeopardy for the same offense.

Barrett v. Bigger, 17 F. 2d 699, cert. den. 274 U. S. 752;

United States v. Watson, 28 Fed. Case No. 16651;

State v. Stiff, 117 Kan. 243, 234 Pac. 704;

Commonwealth v. Gray, 249 Ky. 36, 60 S. W. 2d 133.

16 Corpus Juris 255, in which it is said:

> "But the mere silence of a defendant, or his failure to object or to protest against an illegal discharge of the jury before verdict, does not constitute a consent to such discharge or a waiver of the constitutional inhibition against a second jeopardy for the same offense."

The Court of Appeals said:

> "The real issue presented is whether or not there was a *legal necessity* supporting the discharge of the first jury." (Italics supplied.) [R. Vol. V, p. 1653.]

The law established by this Honorable Court by an earlier case, namely, *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165 and which has been followed throughout the course of the years is that the only time a trial court has authority to discharge a jury before verdict is where:

> "There is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated." (Italics supplied.)

and further that:

> "The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."
>
> *Wade v. Hunter*, 336 U. S. 684;
>
> *Cornero v. U. S.* (9th), 48 F. 2d 69.

Wharton's Criminal Law (12th Ed.), Section 395, lays down the rule as follows:

> "The only causes for which a jury duly impaneled and sworn to try an accused on a criminal charge can be discharged by the court without a verdict are (1) consent of the prisoner, (2) illness of (a) one of

the jurors, (b) the prisoner, (c) the court, (3) absence of a juryman, (4) impossibility of the jurors agreeing on a verdict, (5) some untoward accident which renders a verdict impossible, and (6) extreme and overwhelming physical or legal necessity."

In the case at bar there was no "manifest necessity" for discharging the jury, there was no probability that the ends of public justice would otherwise be defeated, there was no probability that it would be impossible for the first jury to agree upon a verdict, there was no untoward accident which rendered a verdict impossible, there was no extreme or physical or legal necessity for discharging the jury, and in addition thereto, there was no consent of the defendant, Ormont, no illness of a juror or of the defendant or of the court, no absence of any juryman. On the contrary, the court discharged a jury, which had been *accepted* by all parties and sworn *long after* the claimed reason had occurred. The only time the court would have been authorized to discharge the jury or for any of the parties to have objected to or challenged any juror, or the whole panel, would have been *before it was accepted and sworn.* No such objection or challenge was interposed or intimated by any party, but on the contrary, all parties accepted the jury as constituted after full knowledge of the fact and ground which was the basis for the belated motion of Mr. Katz. By so passing and swearing the jury *all parties and the court thereby conclusively waived* any and all objections and challenges to the jury, either as a whole or individually. (Italics supplied.)

See 35 Corpus Juris 346, Section 404½, where it is stated:

"It is well settled that a failure to challenge or object operates as a *conclusive waiver* if the ground

of objection is known to the party at the time the jury is impaneled, * * *" (Italics supplied.)

Citing:

U. S. v. Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277, and cases from Ala., Ark., Cal., Conn., Ga., Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Nebr., Nev., N. H., N. J., N. M., N. Y., Ohio, Okla., Pa., S. C., S. D., Tenn., Tex., Utah, Va., W. Va., Wis., England, and in Bac. Abr. "Juries" 365 it is said:

> "No juror can be challenged without consent after he hath been sworn either in criminal or civil cases, unless it be for some cause which happened since he was sworn."

See also 50 Corpus Juris Secundum 1009, Section 251 and many authorities there cited.

Carruthers v. Reed (C. C. A. Ark.), 102 F. 2d 933. cert. den. 307 U. S. 643, 83 L. Ed. 1523;

Welsing v. U. S., 218 Fed. 369 (134 C. C. A. 177);

State v. Wilson, 204 La. 24, 145 2d 873;

State v. Dedge, 101 N. J. L. 131, 127 A. 139;

Monday v. State, 160 Tenn. 258, 23 S. W. 2d 656;

McKenzie v. State (Tex. Crim.), 11 S. W. 2d 578, 111 Tex. Crim. 299.

It is reversible error for a court to exclude a juror or discharge a jury after it has been sworn for a cause which merely affords a ground of challenge which the parties have waived.

O'Brian v. Com., 9 Bush. (Ky.) 333, 15 Am. R. 715;

Underwood v. State, 179 Ala. 9, 60 S. 842;

Walker v. State, 153 Ala. 31, 45 S. 640;

Van Blaricum v. People, 16 Ill. 364, 63 Am. D. 316;

Crow v. State, 89 Tex. Cr. 149, 230 S. W. 148;

Black v. State, 9 Tex. App. 328;

Montague v. Com., 10 Gratt. (51 Va.) 767;

Cornero v. U. S. (9th), 48 F. 2d 69, 74;

Jackson v. Superior Court, 10 Cal. 2d 350, 74 P. 2d 243;

State v. Willie, 130 La. 454, 58 So. 147;

Cooley's Constitutional Limitations, 6th Ed., 399;

Thompson & Merriam on Juries, Sec. 273;

Bishop, New Crim. Section 1014, 1015;

State v. Slorah (Me.), 106 Atl. 768, 4 A. L. R. 1256, 1260, where it is said as follows:

> "Practically all authorities, with but few exceptions, agree that jeopardy begins when a respondent is put upon trial before a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction, and the jury has been charged with his deliverance. *The jury is said to be charged with his deliverance when they have been impaneled and sworn."* (Italics supplied.)

A jury once duly impaneled and sworn becomes a part of the tribunal *in which the defendant has a vested right* to that specific jury of which right he cannot be divested without his consent.

People v. Young, 100 Cal. App. 18;

Hartzell v. United States, 72 F. 2d 569, cert. den. 55 S. Ct. 216;

Craig v. United States, 81 F. 2d 816 (C. C. A. Cal.), 83 F. 2d 850;

50 Corpus Juris Secundum 927, Note 5, and authorities cited.

The decision of the Court of Appeals was based upon its assertion that the dismissal of the jury was a matter of "discretion" on the part of the trial court. The first error in that premise is that the trial court did not pretend to exercise "discretion," but based its ruling on the erroneous premise that jeopardy had not attached, as the judge in ruling on petitioner's motion for dismissal and plea of former jeopardy said:

> "The Court: I was under the impression that the motion was made on behalf of both defendants. Even so, in considering the matter on the merits, I do not think the motion for a once in jeopardy plea is well taken. While the jury was sworn, there was not even a witness sworn, no opening statement to the jury, and there was nothing that the jury could decide it on. There was no evidence, no presentation of any kind, and *I think there has to be more than the mere swearing of a jury to place a defendant once in jeopardy.* The motion will be denied." [R. Vol. I, p. 304.] (Italics supplied.)

The court was not called upon to exercise any discretion.

Petitioner never at any time so much as intimated that the jury, in which he then had a vested right, should be discharged or that the court should pass upon the propriety of discharging same. The mere fact that Mr. Katz, as attorney for Mr. Himmelfarb only, long after he had waived all objections to the jury made a motion *in behalf of his client* to discharge the jury could not form the basis for the court to discharge the jury so far as Mr. Ormont was concerned. There was nothing to prevent the court from proceeding to trial before that jury so far as Mr. Ormont was concerned, and, in fact, as finally developed, there should never have been a joint trial as Mr. Ormont was acquitted on Count 2 and Mr. Himmelfarb was ac-

quitted on Count 1, and those were the only Counts in which both were charged and the final result was that Mr. Ormont alone was tried on Count 1.

Lastly, the Court of Appeals was in error in holding that under the circumstances of this case, the trial court was vested with any discretion. The decision of the Court of Appeals, if allowed to stand, extends the exception to the constitutional provision against being twice placed in jeopardy and adds an exception that never heretofore has been applied, and one which, if affirmed, will in the future constitute an authority which practically nullifies the constitutional inhibition, and leaves the matter of double jeopardy purely a matter of discretion rather than a constitutional right.

The decision of the Court of Appeals in this case is not in consonance with its decision of *Cornero v. U. S.*, 49 F. 2d 69, wherein it held that the general rule is that where a jury had been impaneled in a criminal case, jeopardy had attached, and in such case the plea of former jeopardy should be sustained. And that the only exception to such a plea is where "urgent necessity" exists or "in order that the ends of public justice may not be defeated" the Court may discharge a jury without the consent of the defendant, but then the Court went on to state:

> "It is true that there is language used by the courts in the foregoing cases which, divorced from its context and applied as authority for the general proposition, would sustain the rule advocated by the government in the case at bar. We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, *and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice.*"

2.

Petitioner Was Immune From Prosecution.

Petitioner having been subpoenaed before the Grand Jury and pursuant thereto having been interrogated with respect to having made profits during 1944 which of course would be directly related to his income and income tax and having also been interrogated with respect to having made over-payments for slaughtering in violation of the O. P. A. and which under the law would not have been properly deductible from his income it follows that he was made immune thereby from being prosecuted for any crime under any statute, including the charge embraced in the indictment in this case, and this whether or not his testimony before the Grand Jury brought forth any incriminating answers since it was possible that the questions might have brought forth incriminating answers and the jury could have asked him questions that would have been incriminating. This was so held in *United States v. Adolschek* (2d), 142 F. 2d 503, 506; *United States v. Monia,* 317 U. S. 424, 87 L. Ed. 376; *United States v. Armour & Co.,* 64 F. Supp. 855 and authorities cited.

The opinion of the U. S. Court of Appeals is in conflict with the following authorities that hold that where a witness is so compelled to testify before a Grand Jury he is immune from prosecution under the particular provision of law being investigated but under every other statute and law.

United States v. Andolschek (2d), 142 F. 2d 503;

Counselman v. Hitchcock, 142 U. S. 547;

Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

In the case of *United States v. Monia, supra,* this Honorable Court granted defendant immunity even though he did not claim the privilege against incrimination although in the case at bar the prosecuting attorney stated that the petitioner and the other witnesses didn't sign waivers of immunity (R. Vol. I, p. 276).

The United States Court of Appeals reached its conclusion by the simple process of omitting the facts in the opinion (Vol. V, pp. 1662-1663) as to the discussion had before the Grand Jury with respect to the profits made by the defendant. It is immaterial whether the testimony given by Ormont before the Grand Jury was remote as it covered the subject matter upon which the government could have interrogated the defendant, and even using the yard stick laid down in the dissenting opinion in the *Monia* case, *supra,* which is by far a more stringent norm than that set by the majority, the defendant still ought to be entitled to immunity for the reason that the government got its *quid pro quod* from the Ormont testimony for the reason as appears from the top of page 1663, R. Vol. V, of the U. S. Court of Appeal's opinion, that King and the Southern California Meat Company entered pleas of guilty to their indictment. We quote from the case of *United States v. Monia,* 317 U. S. 424, 87 L. Ed. 376 as follows:

> "The legislation involved in the instant case is plain in its terms, and on its face, means to the layman that if he is subpoenaed, and testifies, he is to have immunity. Instead of being a trap for

the government, as was the original act, the statutes in question, if interpreted as the government now desires, may well be a trap for the witness. Congress evidently intended to afford government officials the choice of subpoenaing a witness and putting him under oath *with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him.*"

As was said in the *Andolschek* case, *supra,* where the defendant was subpoenaed and testified regarding the withdrawal by permittees from his warehouse of alcohol, the Court quotes from Section 3115 (a), Volume 26, U.S.C.A., Internal Revenue Code then said:

> "No doubt, as the prosecution says, this is directed against "permittees"; but when Andolschek allowed "permittees" to withdraw "alcohol subject to tax," which they could not have done without his connivance, he abetted them in violating section 3115 (a), and by so doing made himself a principal in their crime. * * * *Andolschek could not be forced to testify to that conduct unless he was immune not only from prosecution under Section 3115 (a), but under every other statute, Section 4047 (e) included.*" (Italics supplied.)

3.

Privileged Communications.

The U. S. Court of Appeals completely ignored the rights of the defendant to be entitled to the privilege existing between attorney and client. Its decision is not only in contravention of the common law, but is likewise in conflict with the case of *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563 (C. C. N. Y.), where the Court held as follows:

> ". . . questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such case it would seem fair to apply the same rule to the expert as to the counsel."

Then the Court said:

> "It does, however, appear that he was retained by plaintiffs as an expert *to assist them* in the presentation of their case. As such witness did seem to come within the privilege suggested in the former memorandum—as similar to that of counsel." (Italics supplied.)

Rule 26 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. (following Sec. 687) provides:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The Common Law is laid down in *Walshon v. Stainton*, 71 Reprint 357, 2 Hem & M. 1, where the Court held:

> "The principle is established that where a person has occasion to employ a solicitor, and the solicitor, in order to enable himself to advise on the matter, *calls in some other person to assist him* and to give *his opinion, such communications are as much privileged as if they came from the solicitor himself.* In such a case the person called in (here it was an accountant) is *pro hac vice* the solicitor's clerk." (Italics supplied.)

To the same effect:

8 Wigmore on Evidence, (3rd Ed.) Section 2301, p. 584;

Also see

70 C. J. 501, Section 538.

Hawes v. State, 88 Ala. 37, 7 So. 302.

As a matter of fact, the witness, Malin, being a C. P. A. (R. Vol. 3, p. 1091), the Tax Court and the Treasury Department endowed the C. P. A. with the same privileges as a lawyer under their rules (see Rule 2 "b" United States Code Annotated, Title 26 I. R. C., Sec. 3200 to end, p. 603). The Tax Court recognizes that an accountant who practices before them has the same privileges as a lawyer, including privileged communications (see Internal Revenue Bulletin, Volume XV-2, July-December, 1936, p. 341). Also, see regulations for the recognition of agents and attorneys, made by the Secretary of the Treasury, under authority of Statute 1844, July 7, U. S. Code, Title 5, Section 261, Section 2, paragraph e:

> "An agent enrolled * * * shall have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney, * * *"

It is to be noted that Mr. Malin, *the C. P. A., was retained* by Mr. Mirman, *the then attorney* for the defendant, who specifically hired Mr. Malin for the purpose of securing help from Mr. Malin in order to work out some income tax matters for Mr. Ormont (see R. Vol. III, p. 1094). (Italics ours.)

It is common knowledge, of which the Court can take judicial note, that by reason of the maze of complications in which the Income Tax Law is enshrouded—that most of the taxpayers require the assistance of an "expert" in figuring out and reporting their tax—and further that Certified Public Accountants enter the field of such experts far more than attorneys—and usually an attorney has to call upon such accounting expert to assist him in solving the income tax accounting problems of his clients.

That was the exact situation in this case. Petitioner's attorney, Mr. Mirman, was not skilled in said tax law and "required the assistance of an expert" and accordingly said attorney—not Mr. Ormont—employed Mr. Malin to assist him. Therefore, the reasons and logic employed in patent case (*Lalance, etc., v. Haberman,* 87 Fed. 563) apply in all respects to this case.

No additional cases are required to be cited for the rule that the privilege communications prevails between the client and the enrolled agent, or the agent of the attorney, which in this instance happens to be a C. P. A. To hold as the Court of Appeals held that the privilege was waived merely because:

> "Malin's presence was not indispensable in the sense that the presence of the attorneys secretary may be. It was a convenience which, unfortunately for the accused, served to remove the privilege character of whatever communications were made." (R. Vol. V, p. 1672.)

is to disregard the common law, the law as set forth by all the text book writers like Wigmore and Wharton, and to disregard the decisions laid down by the several states of the United States, and to disregard the opinion as laid down in the *Lalance* case, *supra,* and to create and establish a rule of law that is not in consonance with the reason for the rule—violates the purpose for which the rule was created—and which rule the U. S. Court of Appeals concedes to be the law of privilege, namely: "secure the client's subjective freedom of consultation" (p. 18 of the opinion of the Court of Appeals) and to "condone a dangerous laxity on the part" of the Courts. There is absolutely no basis, in fact or in law, warranting a conclusion reached by the Court of Appeals, and is demonstrative of the fact that the Court of Appeals was more interested in affirming the judgment than it was in protecting the rights of the defendant or establishing sound precedents of law for the reason that a reading of the opinion clearly indicates that while numerous cases are cited in favor of the defendant in each instance the Court of Appeals extended previous existing law just one step farther by throwing the burden on the defendant in each and every instance to show that the defendant was not prejudiced by the error complained or to create law that does not exist.

If indispensability is the basis for the test of privilege, then is it not true that whether privilege exists can never be determined in advance and until the trial court exercises its discretion? We then become a government of men and not of laws, and a client or a lawyer can never be certain as to when the privilege exists or is waived.

4.

Compelling the Defendant to Be a Witness Against Himself in Violation of the Fifth Amendment of the Constitution.

It is error to request a defendant in a criminal case in the presence of a jury to testify or produce documents against his will, although he makes no objection.

McKnight v. United States, 6th, 115 Fed. 972, 927;

14 Encyclopedia of Evidence 646, 647;

State v. Merkley, 74 Iowa 695, 39 N. W. 111;

Gillespie v. State, 5 Okla. Crim. 546, 115 Pac. 620 (Ann. Cas. 1912, p. 259).

In the *Gillespie* case, *supra,* the Court said:

> "When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon."

On page 1686-1687, R. Vol. V, the Court of Appeals said:

> "It was clearly improper for the marshal to serve the defendant in the court room in the presence of the jury; however, there is support for the court's conclusion that the defendant did not suffer prejudice thereby, the court stating that there is no

showing that the jurors knew of the service and, too, that most likely they didn't; the court immediately quashed the subpoena. In light of these facts, we do not find that there was reversible error."

The Court of Appeals in reaching that conclusion violates and disregards the established law of numerous cases for the reason that the law is that a denial or deprivation of accused's constitutional rights has been held to be presumptively prejudicial, *Fina v. U. S.*, C. C. A. Colo., 46 F. 2d 643; *Lonergan v. U. S.*, 88 F. 2d 591; Cert. granted 58 S. Ct. 18, 302 U. S. 663, 82 L. Ed. 512, revised 58 S. 430, 303 U. S. 33.

A presumption of law exists that one who looks sees, or a person is presumed to see that which he could see by looking. The presumption is itself evidence.

Awtio v. Miller, 92 Mont. 150, 11 P. 2d 1039;

Horton v. Atcheson, Topeka, Santa Fe Ry., 161 Kan. 403, 168 P. 2d 928;

Bleirer v. Wolf, 23 Wash. 2d 368, 161 P. 2d 145;

Calvert v. City of Seattle, 23 Wash. 2d 817, 162 P. 2d 441;

O'Brien v. Schellberg, 59 Cal. App. 2d 764, 140 P. 2d 159, 162;

Collier v. Los Angeles Ry. Co., 60 Cal. App. 2d 169, 140 P. 2d 206.

Westberg v. Wilde, 14 Cal. 2d 360, 94 P. 2d 590, the Court held this presumption is itself a species of evidence and it shall prevail and control unless it is overcome by satisfactory evidence.

The Court attempted to distinguish the *McKnight* case from the *Ormont* case on the facts, but a reading of the incident involved will demonstrate that the Court disregarded the *McKnight* case. As a matter of fact *at no time* was the jury ever instructed to disregard the error and as to the quashing of the subpoena, the same occurred during the absence of the jury and to make matters worse in the case at bar and as additional reason for reversing the case, the U. S. Attorney argued to the jury that the books were in evidence, even though the books were never in evidence. The error complained of was caused by the Judge indicating to the U. S. Attorney that the processes of the Court might be available to compel the defendant to produce his books, and thereafter, the Marshal in uniform with the United States Marshal badge in plain view came right in front view of the jurors and handed the petitioner, Ormont, the subpoena. The Court remarked that she was a lady, and it is very obvious that if the Court noticed the lady, the jurors would likewise in conformance with the law above laid down. Throwing the burden upon the defendant to prove prejudice is indicative of the Court's desire to affirm the decision in violation of the general principles of law as above laid down.

5.

The Trial Court Committed Error in Denying Defendant's Motion to Strike All the Evidence Pertaining to Counts 3 and 4 Upon Which the Court Had Previously Acquitted Said Defendant.

RES JUDICATA

Immediately after the defendant, Ormont, was acquitted on Counts 3 and 4, the defendant moved the trial Court to strike all of the testimony and evidence given by the government witnesses, Eustice and Line, (R. Vol. IV, pp. 1374, 1629, 1640) for the years 1942 and 1943 upon the grounds that the evidence was incompetent, irrelevant, immaterial, and prejudicial, if it was allowed to remain before the jury. Error in such ruling is apparent from the fact that Mr. Eustices' testimony accounted for over five hundred pages of the record (Eustices' testimony will be found starting on p. 507 and ending on p. 1014), three fourths of which was confined to counts 3 and 4, and by such ruling the prosecuting attorney was not only able to and did argue the evidence for the years 1942 and 1943, but was permitted, as a result thereof, to falsify the evidence and draw false conclusions therefrom.

The holding of the Court of Appeals that such ruling was not error is contrary to the case of *Gart v. United States,* 294 Fed. 66, and cases therein cited wherein it is said:

> "The scope and purpose of testimony concerning similar offenses is limited as has been laid down in the Supreme Court of the United States in the case of Boyd v. U. S., 142 U. S. 454, 12 S. Ct. 292, 35 L. Ed. 1077, and Hall v. U. S., 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003. Only in exceptional cases is the proof of such transactions admissible. Where a case falls within the exception, the proof

must be clear and convincing. It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof of similar offenses, for the reason that in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance.

"The rule which should apply to this case, has been clearly stated by Judge Sanborn, of our own circuit, in the case of Paris v. U. S., 260 Fed. 529, at page 531, 171 C. C. A. 313, 315, in the following language:

" 'The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. United States, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Hall v. U. S., 150 U. S. 76, 81, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 186, Section 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, *it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible.* Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann.

Cas. 1912D 191; 16 C. J. 592; People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. La Page, 57 N. H. 245, 259, 24 Am. Rep. 69; Fish v. U. S., 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915A 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit, in the case last cited, well said: 'Evidence of this character necessitates the trial of matters collateral to the main issue, *is exceedingly prejudicial,* is subject to being misused, and should be received, if at all, only in a plain case.'" (Italics supplied.)

See also:

Farkas v. U. S., 2 F. 2d 644;
Weil v. U. S., 2 F. 2d 145.

The Court of Appeals cites a number of cases wherein similar offenses were admitted (see Vol. V, pp. 1677 to 1679). A perusal of the cases cited by the Court of Appeals will immediately reveal *that in none of the cases cited was a defendant acquitted on any Count.*[1]

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[1]In *Allis v. U. S.*, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91, evidence was admitted for the purpose of showing an intent in the plan followed; the defendant there went on trial *on all counts.* (Italics supplied.) Likewise *Tinkoff v. U. S.* (7th), 86 F. 2d 866, 879. In the case of *Chattock v. U. S.*, 77 F. 2d 961, cert. den. 296 U. S. 609, there was no acquittal on any of the counts for the defendant. In the case of *Emmich v. U. S.* (6th), 298 Fed. 5, cert. den. 266 U. S. 608, the defendant there admitted an adjustment or liability for the previous year and the defendant was not acquitted or tried for any prior years. In the case of *Rose v. U. S.* (10th), 128 F. 2d 622, 625, the defendant there was found guilty on each count; likewise in the case of *Malone v. U. S.* (7th), 94 F. 2d 281.

To leave this voluminous evidence before the jury could do nothing but confuse and warp their judgment as was said in the case of *People v. Albertson,* 23 Cal. 2d at 580, 581:

> "Here, the fact that the circumstantial evidence of the prior merely suspicious occurrences was adduced *in great quantity so that it comprises a large part of the voluminous record,* cannot serve as a substitute for 'substantiality' where none exists. *This erroneously admitted proof shows,* if anything, *that it must by very reason of its voluminousness have tended to confuse the jurors and warp their judgment.* Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle." (Italics supplied.)

As to Mr. Link's testimony, more was addressed to those two years than to 1944 and the Court, as to this witness, said:

> "* * * I may be pardoned for saying this, but if I had to weigh Mr. Link's testimony I wouldn't give it much credence, * * *" (R. Vol. II, p. 1260).

With this vast amount of testimony and exhibits left in before the jury, which at best was only confusing and which certainly had no place therein, after the acquittal on those two counts, and Government's counsel's argument

referring to the great mass of evidence was sufficient in itself to prejudice the jury against the defendant, notwithstanding the acquittal by the Court on those counts and on that evidence, but by leaving the evidence before the jury and then instructing them as he did that they might consider it on the matter of intent, there can be no question bu what that fact alone influenced the jury and caused a miscarriage of justice herein. The holding of the above cited California case is in consonance with the rule laid down in the case of *Fish v. U. S.*, 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915a 809. The holding of the United States Court of Appeals in extending the rule just one step farther overlooks the general rule of the inadmissibility of the similar offenses in cases of like crimes is admissible in crimes involving intent of the defendant, only as indispensable to the proof of the offense for the purpose of showing that the act or acts were not innocent or mistaken, but constitute an intentional violation of the law; and in accordance with the authorities above cited in cases falling under such exceptions to the rule it is essential to the admissibility of evidence of such other offenses that the proof of the latter offense be *plain, clear,* and *conclusive*. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. The United States Court of Appeals overlooks entirely the reason for the rule and fails to realize that the issue as to whether or not the defendant was guilty of the offenses and acts complained of in 1942 and 1943 were based upon and became *res judicata* by the court's acquittal of the defendant, Ormont. There is no argument with the cases cited by the Court, except that they are inapplicable to the situation at bar for in all the

cases cited the defendant went to trial on all the counts. We, therefore, have a situation of the United States Court of Appeals stating in effect that the trial court has the discretion of admitting into evidence any facts that might fall far short of a completed offense, even though the trial court stated that he thought he was helping the defendant by leaving the mass of evidence in, for the Court said:

> "I thought that it benefited the defendants, leaving it in, as much as it did the government, by virtue of your cross-examination of the defendant Eustice." [R. Vol. IV, p. 1610.]

The defendant at all times questioned the benefit and still does. The U. S. Court of Appeals in attempting to distinguish the admissibility of the similar offenses on the grounds that they were merely admitted "to show his intent to act wilfully, his intention, and his state of mind." [R. Vol. V, p. 1678.]

The rule laid down is in violation of all the holdings pertaining to the general principle of *res judicata*. Corpus Juris, Volume 34, Section 1154, pages 742 and 743, lays down the rule and the ground of the doctrine after citing numerous authorities for its holdings.

The doctrine of *res judicata,* first definitely formulated in the *Duchess of Kingston's* case, embodies two main rules which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) *Any right, fact,* or *matter in issue,*

and *directly adjudicated* upon, or *necessarily involved* in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. The rules afford a logical and convenient method of dividing the numerous cases falling within the principle of *res judicata*. (*In re Food Conservation Act*, 254 Fed. 893.)

The potency and cogency of the rule above laid down is all the more apparent when it is realized that the court itself adjudicated the very facts in favor of the defendant.

The doctrine of *res judicata* is applicable in criminal cases, *U. S. v. Oppenheimer*, 242 U. S. 85, 61 L. Ed. 161, 37 Sup. Ct. Rep. 68, where Justice Holmes said as follows:

> "In this respect the criminal law is in unison with that which prevails in civil proceedings."

This Court in closing stated:

> "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (Jeter v. Hewitt, 22 How. 352, 364, 16 L. ed. 345, 348), in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time."

The Court having acquitted the defendant on Counts 3 and 4 of necessity adjudicated the fact that the of-

fenses complained of in the years 1942 and 1943 were not committed and that the acts therein complained of were not "offenses." To, therefore, hold that the evidence falling far short of the necessary elements required to convict the defendant can be used to secure the conviction for 1944 is, indeed, a violation of the defendant's constitutional rights of being twice placed in jeopardy and in the language of the *Oppenheimer* case:

> "is to do away with what in the civil law is a fundamental principle of justice."

6.

Misconduct of Counsel.

We have set forth in our petition quotations from the government counsel's argument, and have shown therein the falsity of such statements as were made, and we respectfully submit that a reading of those quotations is sufficient to show that the conduct of the prosecuting attorney was deliberate and intended to prejudice the jury against the defendant, and must have had that exact effect and deprived defendant of a fair and impartial trial to which he was entitled under the constitution. Keeping in mind the fact as the Court of Appeals stated on Record volume V, page 1680:

> "We agree that the fact that the prosecutor holds a position of importance lends weight to his utterances and gives serious influence on the jury."

See also:

Latham v. United States, 226 Fed. 420.

It has been held that a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow.

Pharr v. United States, 48 F. 2d 767 (C. C. A. 6);

Pierce v. United States, 86 F. 2d 949.

It has also been held that it is the duty of the Court of its own motion to see to it that the defendant has a fair trial and that the prosecutor does not misstate the facts.

Pierce v. United States, 86 F. 2d 949;

Berger v. United States, 295 U. S. 78, 89, 55 S. Ct. 629, 632.

See also:

United States v. Perlstein, 120 F. 2d 276;

Weathers v. United States, 117 F. 2d 585;

New York Central R. R. Co. v. Johnson, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706.

It was also held that even though some transgressions may be slight so that if they had been promptly corrected, no prejudice would be suffered, but where they have not been corrected, such a course of improper conduct compels reversal.

Pierce v. United States, 86 F. 2d 949;

Volkmor v. United States, 13 F. 2d 594 (C. C. A. 6);

Frantz v. United States, 62 F. 2d 737 (C. C. A. 6).

And see also:

Berger v. United States, 295 U. S. 78, 89, 55 S. Ct. 629, 632, 79 L. Ed. 1314.

In the case at bar as was stated in the *Pierce* case, 86 F. 2d 949, as follows:

> "was neither slight nor confined to a single instance, but so pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential."

The prosecuting attorney in his argument to the jury falsely accused the defendant of "falsifying his books," although he had been rebuked by the Court during the trial for making a similar statement [R. Vol. II, p. 504] and as we have heretofore shown, the books were made correct instead of falsified. Such an argument in effect charged the defendant with a crime of falsifying his books and this argument taken in connection with the erroneous instruction given by the Court to the effect that if they found that the defendant had "in any manner to evade" [R. Vol. IV, p. 1575] could have brought about the verdict in this case. This misconduct alone was sufficient to deprive defendant of his fair trial, but in addition it was the further misstatements by the government attorney to the effect that the books were in evidence—that $50,000 worth of bonds had been purchased, and no explanation of where the purchase money came from except $8,000 cash (these bonds were all bought in 1943, and this is the evidence we moved to strike out after the acquittal of the defendant on the count based on 1943)—that the false statement that none of the checks introduced by defendant were taken into account by the government expert as unreported income. Certainly, the accumulative effect of such a course of improper conduct deprived the defendant of a fair and impartial trial on the merits and should compel a reversal.

7.

Erroneous, Confusing, Conflicting Instructions and Failure to Instruct.

It was the duty of the Court on its own motion to fully and fairly instruct the jury on all the law relating to the facts of the case.

Kinard v. U. S., 68 App. D. C. 250, 96 F. 2d 522, 523;

People v. Putman, 20 Cal. 2d 885 at 890, 891, 129 P. 2d 367;

People v. Best, 13 Cal. App. 2d 606, 57 P. 2d 168.

The defendant has a right to rely upon the correctness of instructions presented by prosecuting attorney. *People v. Best, supra.* In this case, defendant had a right to assume that the U. S. attorney had correctly quoted the Internal Revenue Regulations concerning books or records.

The Court should have instructed the jury on its own motion of the lesser offenses contained within the indictment which would be the offense denounced by Title 26, U. S. C., Section 3616, Subdivision A, a misdemeanor and which section reads as follows:

"Whenever any person * * *

(a) False returns. Delivers or discloses to the collector or deputy and false or fraudulent list, *return, account,* or *statement with intent to defeat or evade* the valuation, enumeration, or assessment intended to be made; or," (Italics supplied.)

And likewise should have instructed the jury under Subdivision A of Section 145, under Title 26 U. S. C.

Nicola v. U. S. (3rd), 72 F. 2d 780;

Kinard v. U. S., supra;

People v. Putman, supra, and

16 Corpus Juris Secundum Section 2451, p. 1023.

It was an incorrect statement of the law and a prejudicial instruction that the Court gave wherein it stated that income "earned" in a given calendar year must be reported for that calendar year. This was highly prejudicial in face of the fact that the prosecuting attorney argued to the jury as follows:

> "He was selling meat. He marked on the invoices the price for the meat. In addition to that he gets side money, extra payments, additional money. He would like to call them gifts. He would like to call them anything else.
>
> "But I ask you, what are those payments? Do you think they were payments in the business, which Mr. Ormont earned, as he reported, some $12,000, in the year 1944; he had such a fine clientele that they gave him gifts, approximately eight-twelfths of the sum he reported in 1945; about $220,000.00. Do you believe he got $220,000.00 in free and voluntary gifts?" [R. Vol. IV, p. 1470.]

Throughout his argument he was contending to the jury that the joint venture return which extended from the 1st day of May, 1944 to the 30th day of April, 1945, thereby having eight months in 1944 that the jury could take into account in their calculation that Mr. Ormont had "earned" eight-twelfths of such amount without any evidence that

he had "received" any such sum and further the foregoing statement of $220,000.00 finds absolutely no support in the record.

Therefore, the foregoing erroneous instruction that they could consider the amount Mr. Ormont had "earned" and find him guilty because he had not reported such earning in the year in which it was earned, regardless of when it was received was in conflict with the law and with the subsequent instruction given by the Court to the effect that a taxpayer on a cash basis need report income only for the year in which he "received" the income.

The Court of Appeals on page 1685 on Record volume V regarding this instruction on earned income said:

> "This latter statement is corrected by subsequently saying in the instruction that he need not report any income if filing on a cash basis until cash is actually received."

This was so stated in a subsequent disconnected instruction, but in any event the Court cites no authorities in support of its statement, and this for the obvious reason that the authorities are to the contrary as held by the authorities in general and as set forth in 16 Corpus Juris 1054, where it is stated:

> "Where an erroneous instruction consists of a palpable misstatement of the law, *it is not cured* by a conflicting or contradictory one which correctly states the law on the point involved, unless the erroneous instruction is expressly withdrawn, for the jury, assuming, as is their duty, that the instructions are all

correct, may as readily follow the incorrect as the correct." (Italics supplied.)

Mills v. United States, 164 U. S. 644, 17 S. Ct. 210, 41 L. Ed. 584;

Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450;

People v. Grahm, 176 App. Div. 38, 162 N. Y. S. 334;

People v. Maughs, 149 Cal. 253;

Funderburk v. State, 145 Ala. 661, 39 So. 672;

Lane v. State, 44 Fla. 105, 32 So. 896;

Beach v. State, 138 Ga. 265, 75 S. E. 139;

Barnes v. State, 61 Tex. Cr. 37, 133 S. W. 887;

Com. v. Molten, 230 Pa. 399, 79 Atl. 638;

State v. Helton, 234 Mo. 559, 137 S. W. 987;

Hoge v. People, 117 Ill. 35, 48, 6 N. E. 796.

In the case of *Hoge v. People,* 117 Ill. 35, 48, 6 N. E. 796, the Court said:

> "Where one instruction says that the law is one thing with regard to a particular matter or state of circumstances, and another instruction says that the law is another and materially different thing with regard to precisely the same matter or state of circumstances, the instructions are repugnant, and no repetition of the correct instruction can cure the error of those that are incorrect."

The instruction of the Court which we have heretofore quoted in the petition and found on page 1575, Vol. IV of the Record to the effect that:

> "any person who wilfully attempts in any manner to evade or defeat * * *"

And then reads the full section of the Code using the same language was highly prejudicial in this case for the reason that the indictment charged the defendant with the specific manner that it was claimed that he had attempted to evade, namely, by filing a false and fraudulent income and victory tax return, and withholding knowledge from the Internal Revenue Department, and having so charged the defendant, the allegations became a material part of the indictment and the burden was upon the prosecution to prove one or both of such means and manner and in order to warrant a verdict.

See:

Kutler v. United States, 79 F. 2d 440;
United States v. Howard, 26 Fed. Case No. 15403, 3 Sumn. 12, 15;
People v. Deysher, 2 Cal. 2d 141, 40 P. 2d 259;
People v. Handley, 100 Cal. 370, 34 Pac. 853;
People v. Lapique, 10 Cal. App. 669, 103 Pac. 164;
People v. Strassman, 112 Cal. 683, 45 Pac. 3;
Hightower v. State, 39 Ga. Appeals 674, 148 S. E. 300;
Naftzger v. United States, 200 Fed. 494.

See:

31 Corpus Juris 837, Section 445.

Also the giving of an instruction which referred to another section of the code [R. Vol. IV, p. 1583] without instructing the jury as to the contents of said section was highly prejudicial.

See:

Butler v. Gill, 34 Okla. 814, 127 Pac. 439, 440.

8.
Closing.

We believe that it is fitting that the writ be here granted because this case presents to the Court many issues of general and national importance. It deals with the most fundamental constitutional rights, privileges, and immunities, the preservation of which it has repeatedly been held, is the highest function of the jundiciary. It is important and its implications reach far beyond the confines of this case. There are certain questions that must be answered here.

Shall a defendant be deprived of a specific jury that has been duly sworn and accepted in which it is admitted that a defendant has a property right? Shall a defendant be deprived of a common law right of consultation with his attorney because the attorney requires expert assistance in order for him to give sound legal advice to his client? Shall a defendant be deprived of his right of immunity after the government extracts its "pound of flesh" or *quid pro quod?* Shall we no longer protect the defendant from his right not to be a witness against himself? Shall we say that any number of errors are slight and not prejudicial no matter how erroneous, merely because the judiciary is attempting to confirm a conviction, irrespective of the defendant's right to a fair trial? Shall we condone a practice of a trial court and a Court of Appeals although admittedly saying the prosecuting attorney committed error?

The conduct, if approved by the opinion of the Court of Appeals if followed gives rise to establishment of a new concept of legal jurisprudence, namely, that the burden of proof is upon the defendant, and it is necessary

for the defendant to prove himself innocent rather than for the state to prove him guilty. It is a reincarnation and legalization of those practices which originally gave rise to the demand for these constitutional safeguards. We have fought a war to safeguard the principal of democracy —to make certain that our way of life shall continue— and that the basic rights of individuals shall be maintained. Now under the guise of protecting the revenue of the country we are seeing the steady and deadly denial of rights of individuals. We have witnessed in the opinion of the United States Court of Appeals, the frittering away of constitutional rights of a defendant.

We respectfully submit that this Honorable Court should issue the writ prayed for.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 296

SAM ORMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 1646–1707) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1949. (R. 1709.) A petition for rehearing was denied August 1, 1949. (R. 1710.) The petition for writ of certiorari was filed on August 29, 1949. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in discharging a jury which had been impaneled and sworn, because of a remark by government counsel which might have prejudiced the petitioner, and proceeding to trial before a second jury.

2. Whether certain testimony of an accountant, employed by the petitioner's attorney in connection with the petitioner's income tax matters, as to disclosures made by the petitioner to the accountant in the presence of two revenue agents was privileged.

3. Whether reversible error arose out of the following matters:

(a) Out of the holding of the trial court that the petitioner was not immune from prosecution because he had testified before a grand jury investigating O. P. A. violations by others.

(b) Out of the holding of the trial court that the petitioner suffered no prejudice as a result of the service of a subpoena *duces tecum* upon him in the presence of the jury, but without it appearing that the jury was aware of such service, the subpoena having been quashed.

(c) Out of the trial court's refusal to strike all of the evidence adduced relating to the petitioner's attempts to evade his 1942 and 1943 income taxes.

(d) Out of certain statements made by the Assistant United States Attorney to the jury in

his summation and out of certain portions of the instructions of the court to the jury, neither of which were objected to at the time.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioners, Sam Ormont and Phillip Himmelfarb, were jointly indicted on January 22, 1947, in the United States District Court for the Southern District of California, in four counts.[1]

[1] Petitioners were indicted and tried jointly in the District Court but took separate appeals to the Court of Appeals, filed separate petitions and briefs for writs of certiorari, and do

Count one charged that petitioners wilfully attempted to defeat and evade the federal income tax liability of petitioner Ormont for the calendar year 1944. Count two contained a similar charge against both petitioners in connection with Himmelfarb's income tax liability for the calendar year 1944.[2] Counts three and four contained similar charges against petitioner Ormont alone as to his income tax liabilities for the calendar

not predicate their petitions upon identical grounds. The Government is filing separate briefs in opposition but will present a consolidated statement of the facts which will be incorporated by reference in the Government's brief in the companion case of *Himmelfarb* v. *United States*, No. 295.

[2] The following table, based on the indictment, shows the amounts by which petitioners were alleged to have understated their incomes and tax liabilities.

SAM ORMONT

NET INCOME

Year	Per return	Per indictment	Difference
1944	$12,174.57	$36,982.52	$24,807.95

TAX

1944	$3,626.58	$18,143.12	$14,516.54

PHILLIP HIMMELFARB

NET INCOME

1944	$4,111.74	$17,752.65	$13,640.91

TAX

1944	$656.00	$5,843.91	$5,187.91

years 1943 and 1942, respectively. (R. 2–6.) After a trial by a jury, Ormont was found guilty upon count one of the indictment and Himmelfarb guilty on count two (R. 133), the trial court having previously dismissed counts two, three, and four of the indictment as to Ormont and count one as to Himmelfarb. After denying motions for acquittal and for a new trial (R. 134–136), the court on June 16, 1947, sentenced each of the petitioners to imprisonment for a term of one year and one day (R. 137–140). On appeal, the Court of Appeals for the Ninth Circuit on June 3, 1949, affirmed the judgments of conviction and on August 1, 1949, denied petitions for rehearing. (R. 1708–1710.)

The facts disclosed by the voluminous record in this case are not in essence complex. The petitioners, Ormont and Himmelfarb, during a period which extended at least from May 1, 1944, to April 30, 1945, operated as a joint enterprise[3] a wholesale meat business known as the Acme Meat Company. The business was conducted, and a regular set of books was kept, on a calendar year basis.

[3] The evidence showed that for all practical purposes Ormont treated Himmelfarb as a partner. (R. 913, 925–926, 928, 1035–1036.) Ormont, however, caused Himmelfarb to be falsely shown on the books as an employee rather than a partner, because he feared that revelation of the truth to other government agencies to whom he had represented that he was doing business as an individual might "cause him embarrassment" and possibly interfere with his receipt of certain subsidies. (R. 439, 1137–1138.)

The evidence showed that during the period May 1, 1944 to April 30, 1945, the petitioners received in cash sums totalling a little more than $70,000 from overcharges (which Ormont preferred to call "bonuses" or "gifts") on meat sold to their customers (R. 1138–1141), these illegal profits being divided equally between the petitioners every day, or every three days. (R. 1035–1036, 1139–1141.) The amounts received in this manner were not recorded on the books of the Acme Company [4] nor reported by either petitioner on the individual income tax return filed by him for the calendar year 1944. (R. 414–416, 421–425, 435, 1138–1141; Gov't Ex. 3, 4, 50–C, 51–D.)

On May 18, 1945, about two months after they had filed their returns for the calendar year 1944, the petitioners learned from agents of the Bureau of Internal Revenue that their income tax returns for the years 1942 to 1944 were under investigation. They immediately sought the advice of a lawyer and an accountant and, on May 24, 1945, filed a "partnership" return showing an income of $71,388.84, equally divided between the petitioners, from "miscellaneous enterprises." These miscellaneous enterprises had, purportedly, been conducted on the basis of a fiscal year running

[4] Ormont kept a small memorandum book in which he jotted down the share of the excess charges received by him—about $35,000 during the period in question. About $11,000 of this amount was received in 1944. He permitted agents of the Bureau of Internal Revenue to examine and copy this data. (R. 1139–1140.)

from May 1, 1944, to April 30, 1945. (R. 383, 1091 *et seq.*, 1127–1128, 1132, Govt. Ex. 6.)

Such other facts as are relevant to the issues sought to be raised by the petitioner Ormont will be briefly stated in the Argument.

ARGUMENT

1. The petitioner asserts, as one of his two "reasons relied on for the allowance of the writ"[5] that he was placed in double jeopardy because the trial court discharged a jury which had been impaneled and sworn to try him on the charge of which he was convicted by a second jury.

When the case was called for trial before the first jury, before opening statements were made or witnesses called, Himmelfarb's attorney made a motion (in which the petitioner Ormont did not join) that a juror be withdrawn and a mistrial declared because of the Assistant United States Attorney's reference to a "pending OPA case" against the petitioners (R. 257). The District Court, finding that there was a possibility that the defendants had been prejudiced, granted the motion (R. 259).

It is clear under the holdings of this Court that "courts of justice are invested with the authority

[5] Although the petitioner has specified a large number of errors alleged to have been committed by the trial court (Br. 28–30), he has relied on only two of these as reasons for granting the writ. These are discussed under the first and second heads of this Argument; the remainder are lumped together under a third head.

to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment * * *." *Thompson* v. *United States,* 155 U. S. 271, 274; see *Wade* v. *Hunter,* 336 U. S. 684, 688–690. "* * * In the federal courts the recognized rule is that discharging a jury before verdict is a matter within the sound discretion of the trial court. * * * A defendant who pleads double jeopardy has the burden of proving" abuse of such discretion. *United States* v. *Potash,* 118 F. 2d 54, 56 (C. A. 2). The court below, upon due consideration of the circumstances, concluded that the trial court had not abused its discretion. (R. 1657.) Such a holding presents no question requiring review by this Court.

2. The petitioner contends (Pet. 23–24) that the trial court erred in admitting any of the testimony of one Malin, an accountant whom Ormont's attorney had employed in connection with his (Ormont's) income tax problems, on the ground that all of such testimony came within the attorney-client privilege and was thus inadmissible.[6] The court below correctly held that

[6] The Petition and Brief seem to imply that Malin was permitted to testify with respect to instructions given him

communications by a client to his accountant are not privileged and that, at the conferences among Ormont, Malin and the attorney, Malin's presence was not "indispensable in order for the communication to be made to the attorney * * *." See Wigmore, *Evidence* (3d ed.), Vol. 8, § 2311, p. 602. The court further concluded, on the evidence, that any disclosures which were made by the attorney to Malin were authorized by the petitioner. (R. 1671–1673.) There is nothing in this which requires review by this Court.[7]

3. *Miscellaneous Specifications of Error.*—The petitioner makes numerous other allegations of error which are so plainly lacking in merit, or so thoroughly dealt with by the opinion of the court below, that no extended discussion is here required. Thus, the petitioner argues (Br. 29, 39–41) that he was immune from prosecution because he had appeared and been interrogated before a grand jury in connection with its investigation of price-control violations by some of the slaughterers who supplied him. The short answer to this,

---

in the petitioner's presence by the petitioner's attorney. (Pet. 9, Br. 29, 42–45.) This issue is not, however, present, for the petitioner's objections to Malin's testimony concerning such instructions were sustained, and no such evidence was admitted. (R. 1095, 1096, 1102–1103.)

[7] It should also be noted that the petitioner voluntarily furnished to the revenue agents (who testified thereto) substantially the same information as that to which Malin was permitted to testify. (R. 883–887, 1017–1090, 1134–1155, 1169–1195.) Their evidence was clearly admissible and is not here challenged by the petitioner.

made by both courts below, is that the petitioner's testimony before the grand jury was elicited in an attempt to discover whether he had been charged illegal prices by the slaughterers and had nothing to do with the question whether he had wilfully attempted to evade payment of his 1944 income tax. (R. 307, 311, 1661–1663.)

The petitioner likewise asserts (Br. 29, 46–48) that he was prejudiced by being served in the courtroom with a subpoena *duces tecum.* (R. 889–891.) The subpoena was quashed (R. 892), and no claim of prejudice was made by the petitioner at the time. The trial court found that the jury probably was not aware of the incident and that the petitioner had suffered no prejudice thereby (R. 890–891), and the Court of Appeals agreed. (R. 1686–1687.) There is no reason to disturb the findings of the lower courts in such a respect.

The petitioner complains of the trial court's failure to exclude all evidence relating to the years 1942 and 1943, after the court had dismissed the counts relating to these years. But, as both courts below pointed out (R. 1374, 1678), the evidence was admissible as bearing upon the defendant's motive and intent—his wilfullness—in 1944. *Allis* v. *United States,* 155 U. S. 117; *Tinkoff* v. *United States,* 86 F. 2d 868, 879 (C. A. 7); *Rose* v. *United States,* 128 F. 2d 622, 625 (C. A. 10).

The petitioner makes the usual complaints of allegedly improper and prejudicial remarks of counsel for the Government. (Br. 30, 56–58.) The court below, having read the argument in its entirety, found nothing which would constitute reversible error. (R. 1703–1704.) There is no reason for further review. Similarly, petitioner complains of "Erroneous, Confusing, Conflicting Instructions and Failure to Instruct." (Br. 30, 59–63.) The instructions of the trial court cover twenty-five pages of the record (R. 1564–1591), and perusal of them will confirm the conclusion of the court below that "they fully cover the applicable law." (R. 1681–1686, 1707.) Moreover, the objections here urged were not pointed out to the trial court. It is well settled that, unless there are exceptional circumstances not here present, such objections present nothing for review when made for the first time in this Court. *Burns* v. *United States,* 274 U. S. 328, 336; *Pennsylvania R. R. Co.* v. *Minds,* 250 U. S. 368, 375; *United States* v. *Atkinson,* 297 U. S. 157, 159.

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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